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June 22, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-266

Dear Ms. Searcy:

Please find enclosed, on behalf of the National Association of Telecommunications Officers and Advisors, et al., two copies of the Petition for Reconsideration and Clarification filed yesterday in the Commission's proceeding in MM Docket No. 92-266. NATOA inadvertently filed an original and nine copies of the Petition yesterday, instead of an original and eleven copies of the Petition as required by 47 C.F.R. §1.429(h).

Any questions regarding this submission should be referred to the undersigned.

Sincerely,

William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

TO: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

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June 21, 1993

SUMMARY

Local Governments commend the Commission on its swift adoption of a comprehensive set of rate regulations implementing Section 623 of the Cable Television Consumer Protection and Competition Act of 1992. However, Local Governments believe that it is necessary for the Commission to reconsider or clarify certain of its rate regulations so that they are consistent with the congressional goal of establishing reasonable rates for subscribers in areas not subject to "effective competition," while ensuring that such regulations do not impose an undue administrative burden

-- Do not presume that SMATVs meet the 50 percent penetration test under the "effective competition" definition.

-- Define the term "comparable programming" in a manner that would include a comparison of the non-broadcast service programming offered by competitors.

-- Define as the initial date of regulation for all tiers subject to rate regulation the earlier of the date that a franchising authority provides a cable operator notice of its right to regulate rates, or the date a complaint is filed regarding the reasonableness of a cable programming service tier rate.

-- Do not require, as a condition of FCC regulation of basic rates, that a franchising authority demonstrate that franchise fees are insufficient to cover rate regulation expenses.

-- Clarify that certifications may be revoked for nonconformance only upon a showing that local regulations are substantially inconsistent with the Commission's rules, and only after a franchising authority has had an opportunity to cure such nonconformance.

-- Permit franchising authorities to enforce franchise provisions establishing the number of channels on the basic service tier.

-- Require parties filing an appeal of a basic rate decision to provide notice to the franchising authority.

-- Clarify that cable operators may not evade the Commission's regulations by substantially increasing the number of menu, directory or similar channels on a cable system.

-- Clarify that complaints challenging current cable programming service tier rates during the statutory 180-day period are grandfathered for purposes of further rate reductions the Commission may order as the result of a further investigation of cable rates.

-- Provide procedures by which the per foot replacement cost of home wiring may be determined.

-- Clarify that a cable operator may not treat increased costs for affiliated programming as "external costs."

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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TO: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, the "Local Governments") hereby submit this Petition in the above-captioned proceeding.

I. INTRODUCTION

Local Governments commend the Commission on its swift adoption of a comprehensive set of rate

1992.[1] The regulations represent a major step towards achieving the congressional goal of establishing "reasonable" rates for cable subscribers in areas not

Commission to reconsider or clarify certain of its rate regulations so that they are consistent with the congressional goal of establishing reasonable rates for subscribers in areas not subject to effective competition, while ensuring that such regulations do not impose an undue administrative burden on the Commission and franchising authorities.

II. DISCUSSION

A. PEG and Franchise-Related Costs

1. PEG and Franchise-Related Costs Should Include Only Direct and Verifiable Costs Required By the Franchising Authority During the Current Franchise Term

The Commission should clarify the definition of "costs of franchise requirements" under 47 C.F.R. §76.925[3] for purposes of determining how to treat public, educational and governmental access ("PEG") costs and other franchise costs under the "external costs" rules, 47 C.F.R. §76.922(d)(2), and the subscriber bill itemization rules. 47 C.F.R. §76.985. The Commission states that PEG costs include "a reasonable allocation of general and administrative

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[3] Unless otherwise noted, references to Part 76 of 47 C.F.R. in this Petition are from Appendix C to the Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266 (released May 3, 1993) ("Order").

overhead" and that other franchise costs include "direct and indirect costs including a reasonable allocation of

initial capital contribution of $1,000 to support PEG facilities, the cost that a cable operator attributes to such a requirement cannot exceed more than $100 per year or $8.34 per month.

A definition of costs of franchise requirements that is limited to direct costs specifically enumerated in the franchise agreement and required by a franchising authority will resolve many of the potential abuses with the definition the Commission has adopted. Moreover, with regard to bill itemization, such a requirement is consistent with Congress' intent, as recognized by the Commission, that itemized costs be "direct and verifiable." H.R. Rep. No. 628, 102d Cong., 2d Sess. 86 (1992); Order at ¶ 546.

The Commission's current definition of franchise costs can be abused in a number of ways.

For example, a cable operator might attempt to pass on as "indirect" franchise costs the costs it might incur if a franchising authority required it to comply with the FCC's customer service standards. The cable operator may count in such costs the costs of a customer service office, salaries of customer service representatives, additional telephone lines and other customer service-related costs. It is unfair for cable operators to attempt to pass such costs directly on to subscribers in this manner, given that many cable

operators incur these costs already, even in the absence of a franchise provision requiring compliance with the federal standards.[4] A number of cable operators apparently are voluntarily complying with minimum customer service standards adopted by the National Cable Television Association, which imposed requirements similar to those imposed by the FCC.

Moreover, cable operators often voluntarily agree to provide certain services and such voluntary agreements are often included in the franchise agreement, despite the fact that such provisions are not required by the franchising authority. Where a cable operator has voluntarily assumed a franchise obligation, it should not be permitted to treat such obligation as an external cost or to itemize such a cost. Such costs are costs that the cable operator voluntarily assumed, and therefore, they should be treated the same as other voluntary costs a cable operator incurs, such as costs for different types of programming, and should not be

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[4] With regard to subscriber bill itemization, the Commission appears to suggest that customer service costs may not be itemized: "[T]o the extent a franchising authority imposes special costs not of benefit to all subscribers in consideration of the award or renewal of a franchise, these may be included in an itemization as either a franchise fee or PEG costs." Order at ¶ 546. Given that customer service requirements benefit all subscribers, Local Governments assume that they may not be itemized.

treated as a franchise cost.[5] Excluding such costs for purposes of bill itemization is permitted by Section 622(c), which, as the Commission recognizes, "has to do with increasing political accountability for regulatory costs imposed, by permitting subscribers to be informed that a portion of their bills are related to governmentally imposed obligations." Order at ¶ 545. Moreover, the exclusion of such costs as "external costs" for purposes of rate regulation is appropriate, given that the Commission's reason for treating franchise costs as "external costs" -- that "[franchise] costs are largely beyond the control of the cable

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[5] Similarly, cable operators that failed to provide certain services in violation of a previous franchise agreement may agree to a settlement agreement which requires them to provide such services during the term of a renewed franchise. The cable operator would have incurred such additional costs due to its voluntary failure to meet obligations during the previous franchise term. Current subscribers should not have to pay for a cable operator's past violations of a franchise agreement. Cable operators should not be permitted to treat such settlement costs as franchise costs for purposes of rate regulation or bill itemization.

In addition, cable operators may use PEG equipment required by a franchise for other purposes. For example, in some franchise areas, cable operators permit leased access users to use PEG facilities for the production of leased access programming, or cable operators may use PEG facilities to produce their own local origination programming. It is unfair to consumers for the cable operator to pass through as PEG costs, or include in an itemization of PEG costs, a cable operator's use of such equipment and facilities for non-PEG purposes.

operator" -- is inapplicable in this instance. Order at ¶ 254.

In addition, by allowing cable operators to pass through as franchise costs "a reasonable allocation of general and administrative overhead," the Commission is permitting a cable operator to treat as an increase in a PEG or franchise cost a cost that may be totally unrelated to a cable operator's actual PEG or franchise costs. For instance, although a cable operator may not experience any increase in PEG or franchise costs -- which is typically the case since such costs often do not increase during the franchise term -- it may incur a significant increase in its administrative and general overhead costs. The cable operator would be permitted to allocate a portion of such an increase to PEG and franchise costs and then recoup such an increase as an external PEG or franchise cost or to reflect such an increase in its itemized bill, despite the fact that neither PEG nor franchise costs have actually increased.[6] Such an action by the cable operator does not promote the Commission's goal of political accountability, nor is it related to the Commission's

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[6] Indeed, in many franchise areas, administration and management of PEG channels is performed by an independent public access organization, totally unrelated to the cable operator.

intention of permitting a cable operator to recoup franchise costs beyond its control.

The above examples are just a few of the many ways that cable operators may exploit the overly broad definition of PEG and franchise costs that the Commission has adopted. Such a definition will lead to unnecessary disputes between cable operators and the Commission or a franchising authority as to what is an "indirect cost" or a "reasonable allocation of administrative costs or overhead." In order to prevent such abuses and disputes, the Commission must adopt an easily administrable and realistic definition of PEG and franchise costs that takes into account a cable operator's true PEG and franchise costs. As suggested above, we propose that the Commission clarify that PEG and franchise costs include only direct monetary costs specifically enumerated in the franchise agreement and which are required by the franchising authority.

2. Franchise Costs Should Not Be Treated As External Costs

Local Governments urge the Commission to reconsider its treatment of franchise costs as external costs. 47 C.F.R. §76.922(d)(2). Many of the costs cable operators may attempt to recover as "external costs" are already accounted for in the benchmark rates established by the Commission. Other than franchise

fees, cable operators should not be allowed to recover as a direct pass through to subscribers the "costs of franchise requirements." The Commission's benchmark rates are based on rates charged by cable operators as of September 30, 1992. The only costs the Commission excluded from such rates were franchise fees. Therefore, all other franchise costs, including costs for PEG requirements, are reflected in those benchmark rates. The Commission would be allowing a cable operator to recover such costs twice if the cable operator is able to charge the benchmark rate which reflects such costs and to directly pass through such costs to subscribers. See, e.g., Order at ¶¶ 254, 257.

Local Governments recognize that the Commission must still adopt forms prescribing the precise methodology for calculating and allocating external costs. Order at ¶ 254 n.604. Local Governments urge the Commission to ensure that the forms take the above concern into account and not allow cable operators to directly pass through PEG and other franchise-related costs in the same manner as franchise fees are passed through. If the Commission determines that such costs must be treated as external costs, then they should be treated as programming costs are treated; such costs should not be recovered unless there is an increase in such costs that exceeds the increase in the GNP-PI. In

measuring whether there has been an increase, a cable operator may take into account only requirements imposed by a governmental authority in addition to those already required in a franchise agreement. Cable operators' rates already take into account current franchise requirements. Hence, to the extent a cost incurred in any given year was incurred to satisfy requirements in the current franchise, such costs in most cases should not be treated as external costs.

3. For Purposes of Subscriber Bill Itemization, the Commission Should Clarify that Franchise Fees Do not Include Franchise-Related Costs

Local Governments request that the Commission reconsider its conclusion that a cable operator may itemize as franchise fees, costs required under a franchise agreement for the construction of institutional networks, free wiring of public buildings, provision of special municipal video services, voice and data transmissions, and "special costs not of benefit to all subscribers." Order at ¶ 546. Such costs are not franchise fees under Section 622 of the Cable Act, and cable operators should not be permitted to count them as such for purposes of itemizing franchise fee costs.

Section 622 defines a franchise fee as "any tax, fee, or assessment or any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of

their status as such." Section 622(g)(1). This definition significantly limits the types of franchise requirements that are included in calculating a franchise fee.

Under this definition, franchise requirements which may be of value to the franchising authority, but which do not constitute a "tax, fee or assessment," should not constitute a franchise fee. Support of institutional networks, free wiring of public buildings, provision of special municipal video services, voice and data transmissions, and similar services, regardless of whether they are of benefit to all subscribers, are examples of such requirements that do not constitute franchise fees.[7] Section 622 "defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment." 130 Cong. Rec. H10,441 (daily ed. Oct. 1, 1984) (remarks of Rep. Wirth) (emphasis added).

In contrast, in applying its former rule prohibiting franchise fees in excess of 3 percent (or in excess of 5 percent with permission), the FCC previously

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[7] Moreover, to the extent any franchise requirements are voluntarily made by a cable operator, and are not "imposed" by a franchising authority or other governmental entity, such requirements are not franchise fees under Section 622.

counted as franchise fees "all forms of consideration," pursuant to Section 76.31 of its Cable Television Service rules in effect at that time. For example, the FCC in pre-1984 Cable Act decisions invalidated facilities and equipment requirements where it found them to be "clearly excessive" or to benefit only one group of special users. See, e.g., In re Application of Birmingham Cable Communications, Inc., 52 F.C.C. 2d 1099 (1975). Congress was aware of the FCC's practice in existence at the time it implemented the 1984 Cable Act, yet Congress did not choose to incorporate the "payments-in-kind" concept into Section 622. Indeed, as suggested above, Congress intended to limit the calculation of franchise fees to monetary payments.

Local Governments believe that Section 622 clearly prohibits cable operators from including in the calculation of franchise fees costs for the support of institutional networks, free wiring of public buildings, provision of special municipal video services, voice and data transmissions, and similar costs, regardless of whether such requirements are "special costs not of benefit to all subscribers." Order at ¶ 546.

4. PEG Costs Should Not Be Allocated Solely to the Basic Tier

The Commission should reconsider its rule requiring that costs for PEG channels carried on the

basic tier be allocated to such tier. 47 C.F.R. §76.924(e)(5). Costs attributable to PEG channels on the basic service tier, or any other tier, should be allocated across all of the services offered by a cable operator, and should not be allocated solely to the basic tier, as proposed by the Commission. Franchise requirements for PEG channels, facilities and equipment are similar to franchise fees in that they are imposed on cable operators in return for the use of valuable public rights-of-way. Moreover, the Cable Act treats certain support for PEG facilities as franchise fees. See 47 U.S.C. §542(g)(2)(B)-(C) (off-setting certain on-going financial support for PEG facilities against franchise fees).

Under the Commission's rules, franchise fee costs are allocated among equipment and installation, and across programming services. See, 47 C.F.R. §76.924(e)(4). PEG costs should be allocated in the same manner, regardless of what tier PEG channels actually appear.

B. "Effective Competition" Rules

1. The Term "Franchise Area" Under the Effective Competition Definition Should Be Defined As the Area Actually Passed By a Cable System's Distribution Plant

Section 623(l) does not define the term "franchise area" for purposes of determining whether a

cable system is subject to effective competition, although it is clear that Congress intended the term "effective competition" to encompass only those franchise areas where cable systems are subject to actual competition.[8] Thus, in the absence of a statutory definition of the term, the Commission should adopt a definition of "franchise area" for purposes of the "effective competition" definition that is consistent with Congress' competitive goals.

Local Governments believe that the Commission should define the term "franchise area" as the area actually passed by a cable system's distribution plant, to which cable subscribers can connect to receive service for a standard installation fee.[9] Under this definition, only cable systems with a penetration rate below 30 percent in their actual service areas (the "de

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[8] For example, Congress stated in the findings to the 1992 Cable Act that "most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers . . . ." Section 2(a)(2), 1992 Cable Act.

[9] The proposed definition for a cable operator's service area is similar to that the Commission adopted in its programming access rulemaking proceeding. "Area served by cable system" is defined under the programming access rules as "an area actually passed by a cable system and which can be connected for a standard connection fee." See 47 C.F.R. §76.1000(a) (to be codified).

facto" franchise area) would be considered subject to "effective competition"; cable systems with a penetration rate below 30 percent within the area in which they are authorized to provide cable service (the "de jure" franchise area) would not be subject to "effective competition" if their penetration rate is higher than 30 percent in their de facto franchise area. Moreover, cable systems with franchises to serve the same franchise areas but that choose to serve less than half of the franchise area, with the result that there is no overlap in their actual service areas, also would not be subject to effective competition under this definition, despite the fact that each may have a penetration rate of 15 percent in the de jure franchise area.

It is essential for the Commission to define a "franchise area" as the cable operator's service area if the Commission is to achieve Congress' goal of protecting consumers from unreasonable cable rates. Otherwise, if "franchise area" is defined as the area in which the cable operator is authorized to provide service, a cable operator could manipulate its service area in order to avoid rate regulation.[10]

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[10] In defining other provisions under the "effective competition" definition, the Commission has recognized the need to avoid manipulation of the definition by

[Footnote continued on next page]

For example, if the Commission defined "franchise area" as the de jure franchise area, a cable operator might voluntarily choose to serve less than the 30 percent of its de jure franchise area, even though its penetration rate is significantly higher than 30 percent in its actual service area -- thus avoiding rate regulation. The cable operator may choose instead to maximize its rate of return by imposing rates significantly higher than that permitted under the Commission's rate rules in its limited service area. Congress clearly did not intend such a result.

2. SMATVs Should Not Be Presumed to Meet the 50 Percent Penetration Test

The Commission should reconsider its finding that, for purposes of the 50 percent penetration test,

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[Footnote continued from previous page]
cable operators. For example, in determining whether cable service is "offered" in a franchise area for purposes of measuring effective competition, the Commission has stated that a cable operator should not be considered to be "offering" cable service in a franchise area where the cable operator "either voluntarily or involuntarily" does not offer service to subscribers, even if the operator may "pass" the household, but is not willing or able to serve the household. Order at ¶ 29 n.84. Similarly, the Commission should define "franchise area" in a manner that takes into account the area where an operator actually provides service, rather than where it theoretically may provide service. Moreover, if a cable operator fails to wire an entire franchise area as required by the franchise and therefore has a penetration rate below 30 percent, such failure and breach of the franchise should not entitle the operator to be exempt from rate regulation.

a SMATV service "is technically available nationwide in all franchise areas," and actually available in most franchise areas. Order at ¶ 31. Such service is not available to all subscribers in every franchise area of the country. The Commission's finding is erroneous for several reasons.

First, the Commission's conclusion appears to be based on the erroneous assumption that there is a single SMATV service provider that provides such service. Just as there is no one cable operator that serves the entire country, there is no one SMATV service provider. There are a number of distributors of SMATV services throughout the country, each of which may target different regions of the country in terms of service. Hence, although collectively these providers -- even if they could obtain access to every building in the nation[11] -- may theoretically be capable of serving the entire nation, the Commission cannot assume that any one of them is "technically and actually" available throughout the country.

Moreover, Section 623(1) prohibits the Commission from determining that SMATV services meet the 50 percent penetration test nationwide based on the segments of the

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[11] For example, not every jurisdiction has laws or regulations requiring landlords to provide access on reasonable terms and conditions to all multichannel video programming distributors.